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In the

Supreme Court of the United States

October Term, 1956

FLOYD E. KIDD,

Petitioner,

vs.

MERCK & COMPANY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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MERCK & COMPANY, INC.,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Floyd E. Kidd prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled cause on April 6, 1957.

CITATIONS TO OPINIONS BELOW

The majority opinion of The Court of Appeals, and the dissenting opinion, printed in Appendix B hereto, infra, pp. 20-21, are reported in ..... F. 2d .....

JURISDICTION

The judgment of the Court of Appeals was entered on April 6, 1957. R., "Proceedings In the United States Court

of Appeals for the Sixth Circuit"; Appendix B, infra p. 14. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED

Whether, ascribing to words their ordinary meaning, the virus of serum hepatitis, contained in blood plasma, as a matter of law cannot be deemed a filthy substance within the intendment of the Tennessee Food, Drug and Cosmetic Act for the reason that the presence of the virus in plasma can be determined only by its effects upon the victim, and not by visual inspection under present-day microscopes.

In its broader aspects the question is whether the occasional victim of the disease of serum hepatitis, caused by the presence of the hepatitis virus in blood plasma, must bear the entire burden of the disease, or whether that burden should be shared by plasma manufacturers and ultimately by society as a whole.

STATUTES INVOLVED

The statutory provisions involved are Sections 52-103(a), 52-105(a), 52-110(a) (1) (2) (3) * * *, 52-115(a) (1) of the Tennessee Food, Drug and Cosmetic Act, Vol. 9 of Tennessee Code Annotated, formerly carried as Sections 6580.3(a), 6580.5(a), 6580.10(a) (1) (2) (3) * * *, and 6580.15 (a) (1) of the Supplement to the Code of Tennessee; and Sections 331(a), 333(a), 342(a) (1) (2) (3) * * *, and 351(a) (1) of the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040, 21 U. S. C. They are printed in Appendix A, infra, pp. 11-13.

STATEMENT

On January 26, 1953, Floyd E. Kidd filed suit in the district court seeking a recovery in the amount of $50,000 for an illness caused by contaminated blood plasma manufactured and distributed by Merck & Company, Inc. The jurisdiction of the district court was invoked because of diversity of citizenship, the plaintiff being a citizen of Tennessee and the defendant a citizen of New Jersey. The original complaint charged common law negligence, breach of implied warranty of fitness, breach of the Tennessee Food, Drug and Cosmetic Act, and breach of the Federal Food, Drug, and Cosmetic Act. (R., 2a). Petitioner amended his complaint after answer was filed and proceeded to trial solely on the charge of a breach of the Tennessee Food, Drug and Cosmetic Act (R., 11a), it being his theory that a breach of that act (or of the Federal Act) amounted to negligence per se, and that under the doctrine of strict liability he would be entitled to recover upon a showing that the contaminated plasma was the proximate cause of his illness. The district judge entered judgment on a jury verdict in favor of petitioner (R., 160a), and overruled respondent's motion for judgment notwithstanding the verdict, or for a new trial (R., 166a).

The court below held that the district court was in error in failing to direct a verdict for the respondent, set aside the judgment, and ordered the case remanded with directions to enter a judgment for respondent. The assigned reason was that ascribing to words their ordinary meaning something which cannot be seen by a microscope, or the presence of which cannot be known except for its ultimate result is not a filthy substance within the intendment of the statute. (Appendix B, infra, p. 20).

The view expressed in the dissenting opinion was that the virus of serum hepatitis contained in plasma renders

it filthy, even though it cannot be seen by a microscope; "and I would consider this to be the case as a matter of law." (Appendix B, infra, p. 21).

REASONS FOR GRANTING THE WRIT

1. The question presented is of more than local significance for the reason that the Tennessee Food, Drug and Cosmetic Act is patterned upon the Federal Food, Drug, and Cosmetic Act. Under both acts, in identical language, a drug is deemed to be adulterated if, among other things, "* * * it consists in whole or in part of any filthy, putrid, or decomposed substance; * * *". The identical provision appears in the acts of at least twelve other states[1], likewise patterned upon the Federal Act, with similar provisions in the acts of a majority of the remainder. At least one state[2] provides by statute that definitions adopted for enforcement of the Federal Act of 1938 "shall be adopted for the enforcement of this article." Furthermore, the majority opinion contains this statement: "Both parties to this appeal, however, agree that since the Tennessee law is patterned upon the Federal Act, resort may properly be had to federal court decisions construing the latter statute." (Appendix B, infra, p. 18).

2. The question presented is one which has not been but should be decided by this Court. It is of importance in the administration of the various food and drug acts. Under the majority opinion of the court below a shipment of plasma, which otherwise conforms but which, through use of a portion of the lot, is known to be contaminated with the virus in question (or any other virus ultra-microscopic in size) could not be seized by the appropriate au-

[1] Calif., Conn., Fla., Ind., La., Mo., Mass., N. H., N. Y., N. D., N. M., and Wash.

[2] Okla., 1941 Statutes, Title 63, Section 184.

thorities as adulterated. The problem at hand is one brought to light by recent achievements in the field of virology. While the record does not contain statistics as to the annual number of victims of the disease the Court judicially knows that the use of plasma is widespread, and that viral agents are playing a role of ever increasing importance in the catalogue of diseases affecting mankind. A decision of the question is of importance to these victims, to the drug industry, and to trial courts currently faced with the problem of construction here involved.

3. The decision of the court below is erroneous (a) in that it conflicts in principle with applicable decisions of this Court insofar as it turns on scienter; (b) in holding that the virus of serum hepatitis as a matter of law cannot be deemed a filthy substance; (c) in holding that the term filthy, as used in the drug act, excludes the concept of fitness except insofar as that concept pertains to rodent hair and the like; and (d) in holding that as applied to the facts of this case there is a substantial difference between the statutory definition of an adulterated food and that of an adulterated drug.

(a) Scienter — The principle of law announced in the majority opinion is as follows: "Ascribing to words their ordinary meaning, as exemplified by the cases cited, we agree with the appellant that a virus which cannot be seen even with the most powerful microscope, which cannot be described, and the presence of which cannot be known at all except for its ultimate result, is not a filthy substance within the intendment of the statute." Although this sentence begins with a reference to the ordinary meaning of words, the predominant thought is that a manufacturer may not be held liable for a harm caused by his product if he had neither the knowledge of its harmfulness nor the means of knowledge. In *United States* v. *Dottereich*,

320 U. S. 277, 281, 88 L. Ed. 48, 51, 64 S. Ct. 134, this Court held that legislation such as the Federal Food, Drug and Cosmetic Act "dispenses with the conventional requirement for criminal conduct — awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger." In his dissenting opinion in *Morissette* v. *United States* 187 F. 2d 427, 434 (6 Cir., 1951); Judge McAllister stated that "where the emphasis of the statute is upon some social betterment, *scienter* is not an element of the offense * * *." In reversing the majority decision of the Court of Appeals in *Morissette*, 342 U. S. 246, 254, 91 L. Ed. 288, 296, 72 S. Ct. 240, this Court pointed out the distinction between the types of criminal offenses requiring *scienter* and those not requiring it, the latter being referred to as public welfare offenses. This Court further observed that many of the duties which have been heightened by increasingly numerous regulations "are sanctioned by a more strict civil liability * * *."

(b). The virus may be a filthy substance. — The word filthy; standing alone, is meaningless. As an adjective it becomes meaningful when used to denote a quality of the thing named. Whether the quality of filthiness may be ascribed to a particular substance depends largely upon the use to which it is put, the purpose for which it was designed, or the context in which it appears. But until the substance is known to exist no quality, of course, can be ascribed to it. This seems to be one of the points of the decision below, i.e., a virus which cannot be seen or known to exist ("*except for its ultimate result*"), cannot be said to be filthy. The italicized exception, however, makes it clear that the virus does have existence; and whether the knowledge was gained retrospectively and

clinically (R. 114a, 116a) rather than microscopically does not affect the validity of the knowledge, nor render the virus incapable of having qualities ascribed to it: interesting, filthy, ultra-microscopic, deleterious, and the like, depending upon the context in which it appears. A culture of the bacillus typhosus prepared for microscopic study ordinarily would not be considered a filthy substance. Added to a sandwich it would make the sandwich filthy just as surely as would the addition of rodent hair, and the sandwich should be subject to seizure not alone on the ground that it is "otherwise unfit for food," but also on the single ground that it consists in whole or in part of a filthy substance. The same should be equally true of a shipment of bottles of mineral water into which the culture somehow found its way. The microscopically detectible bacillus typhosis absorbed by live oysters during the process of growth from the liquid which they consumed in their natural functions was held to be a filthy substance, in *United States* v. *Sprague*, 208 Fed. 419 (D. C. N. Y., 1913). There the court said: "The ordinary use of 'adulteration' implies an actual addition to the original substance, through human agency. But the word as used in the section does not restrict this to addition by the hand of man, and if the adulteration of filthy, decomposed, or putrid substance has been added by nature, and is contained in the article to be shipped, it is adulterated in the eyes of the law." Again, "A substance containing bacilli liable to cause disease to such an extent as to make it dangerous for food purposes, is certainly 'filthy' under the meaning of that word as generally used, and especially since the result of investigation has shown that filth or dirtiness is dangerous through the germs which it contains, and not solely because of offense to the senses." No less so should be a shipment of infected plasma designed for introduction

into the human blood stream directly rather than through the gastro-intestinal tract. To impart to a victim of serum hepatitis the knowledge that he had received infected plasma undoubtedly would give offense to his senses just as certainly as would the knowledge in the case of infectious hepatitis that his disease came from drinking contaminated water or eating contaminated food. The virus of serum hepatitis, therefore, is a filthy substance if it is present in blood plasma, not only in the ordinary sense of the word, but especially as the word is used in the statute.

(c) Filthiness and injuriousness are not mutually exclusive terms. — While it is clear that the act does not require a food substance to be injurious to health to be filthy within the meaning of the statutory definition, *United States* v. *133 Cases of Tomato Paste*, 22 F. Supp. 515, 516 (E. D. Pa., 1938), it is equally clear that a substance which is injurious to health also may be filthy. *United States* v. *Sprague*, 208 Fed. 419 (D. C. N. Y., 1913). In the former case emphasis is placed upon the aesthetic tastes of the consuming public, while in the latter case emphasis is placed upon the danger to health. In *United States* v. *44 Cases, etc.*, 101 F. Supp. 658 (E. D. Ill., 1951), in response to the defendant's contention that an adulterating substance could not be deemed filthy unless injurious to health, it was held that the word should be given its ordinary meaning and not confined to any scientific or medical definition, citing *United States* v. *Swift & Co.*, 53 F. Supp. 1018 (M. D. Ga., 1943); in which latter case the defendant's contention does not appear. It is clear that all these cases further the legislative purpose of providing protection to the public. In the instant case the damage has been done and petitioner seeks partial recompense.

(d) There is no substantial difference between the statutory definition of an adulterated food and that of an adulterated drug under the facts of this case.

Under both the Federal and Tennessee Acts a food shall be deemed to be adulterated "if it bears or contains any poisonous or deleterious substance which may render it injurious to health * * *" (52-110(a) (1); 21 U.S.C.A. 341(a) (1), Appendix A, infra, p. 11). This particular provision was omitted from the definition of an adulterated drug. In its majority opinion the court below stated that this omission is in tacit recognition of the fact that many valuable drugs can or may contain substances of potential injury to health, and undoubtedly this is so. It is not reasonable, however, to attribute to the legislative bodies passing those acts an intention to exempt a drug containing a deleterious substance which is not a normal constituent thereof, and which is supposed not to be in the drug. This is the reason one of the medical witnesses referred to the virus as a filthy substance (R. 102a-103a), others agreed that the term was applicable in a lay sense (R. 94a, 119a, 128a), and still others in a retrospective sense (R. 118a, 135a).

It is stated in the majority opinion of the court below that if the virus were present in food the food would clearly be adulterated under the definitions referred to immediately above as the virus is a "deleterious substance" which may render food "injurious to health".

It should be noted that food containing the virus would be adulterated under Tennessee Code Annotated, Section 52-110(a) (3) and 21 U. S. C. A., Section 341(a) (3), Appendix A, infra, p. 11, because such food obviously would be unfit. Aside from it being adulterated as "otherwise unfit for food" it would be equally adulterated as containing a filthy substance. *United States* v. *Sprague*, 208 Fed. 419 (D. C. N. Y., 1913). The subsections just cited read: "* * * if it consists in whole or in part of a * * * filthy * * * substance, or if it is otherwise unfit

for food * * *." That the prohibition against filthy substances in food, and the prohibition against food otherwise unfit are independent bans is discussed in *United States* v. *1 ... Cases, etc.*, 212 F. 2d 567 (2 Cir., 1954). If the clause "otherwise unfit for food" should be disregarded, it will be seen that the remainder of the definition of an adulterated food under the sub-section cited is identical with the definition of an adulterated drug as defined in Tennessee Code Annotated, Section 52-115 (a) (1) and in 21 U. S. C. A., Section 351 (a) (1). As was noted in *Salamonie Packing Co.* v. *United States*, 165 F. 2d 205 (8 Cir., 1948), cert. den. 333 U. S. 863, "Apparently, for years, food processors have been endeavoring, unsuccessfully, to secure a ruling which would compel the Government, in cases such as this, to prove that an accused article of food contained so much decomposed matter as to make it unfit for human consumption." To the extent that the decision below holds food containing the virus to be adulterated because "injurious to health" and, inferentially, not because it contains a filthy substance, it conflicts in principle with *Salamonie*, supra, and offers encouragement to those who would have the two clauses of the acts under consideration construed as dependent rather than independent clauses.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

BEN F. McAULEY,
Counsel for Petitioner.

May 22, 1957.

APPENDIX A

STATUTES INVOLVED

Tennessee Code Annotated

"52-103. Prohibited acts. — The following acts and the causing thereof within the state of Tennessee are prohibited:

(a) The manufacture, sale, or delivery, holding or offering for sale of any food, drug, device or cosmetic that is adulterated or misbranded. * * *

* * *

"52-105. Violations a misdemeanor — Penalty — Exceptions. — (a) Any person who violates any of the provisions of Section 52-103 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than thirty (30) days or a fine of not more than fifty dollars ($50.00), or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final such person shall be subject to imprisonment for not more than six (6) months, or a fine of not more than one thousand dollars ($1,000.00), or both such imprisonment and fine. * * *

* * *

"52-110. Food deemed adulterated. — A food shall be deemed to be adulterated:

(a) (1) If it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance such food shall not be considered adulterated under this clause if the quantity of such substance in such food does not ordinarily render it injurious to health; or (2) if it bears or contains

any added poisonous or added deleterious substance which is unsafe within the meaning of Section 52-114; or (3) if it consists in whole or in part of a diseased, contaminated, filthy, putrid, or decomposed substance, or if it is otherwise unfit for food; * * *.

* * *

"52-115. Drugs or devices deemed adulterated. — A drug or device shall be deemed to be adulterated:

(a) (1) If it consists in whole or in part of any filthy, putrid, or decomposed substance; * * *."

21 U. S. C. A.

"Section 331. Prohibited acts

The following acts and the causing thereof are hereby prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded. * * *.

* * *

"Section 333. Penalties — Violation of section 331

(a) Any person who violates any of the provisions of section 331 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final such person shall be subject to imprisonment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine. * * *.

* * *

"Section 342. Adulterated food

A food shall be deemed to be adulterated—

Poisonous, insanitary, etc., ingredients

(a) (1) If it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance such food shall not be considered adulterated under this clause if the quantity of such substance in such food does not ordinarily render it injurious to health; or (2) if it bears or contains any added poisonous or added deleterious substance, except a pesticide chemical in or on a raw agricultural commodity, which is unsafe within the meaning of section 346 of this title; or (3) if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food; * * *.

* * *

"Section 351. Adulterated drugs and devices

A drug or device shall be deemed to be adulterated—

Poisonous, insanitary, etc., ingredients

(a) (1) If it consists in whole or in part of any filthy, putrid, or decomposed substance; * * *."

APPENDIX B

CAUSE ARGUED AND SUBMITTED

February 13, 1957 — Before McAllister, Miller and Stewart, Circuit Judges.

This cause is argued by Hayward H. Coburn for appellant and by Ben F. McAuley for appellee and is submitted to the court.

JUDGMENT

(Filed April 6, 1957.)

Appeal from the United States District Court for the Eastern District of Tennessee.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Tennessee, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby set aside, and the case is remanded to the District Court with directions to enter a judgment for the appellant.

OPINION

(Filed April 6, 1957.)

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

No. 12918

MERCK & COMPANY, INC.,
Appellant,

vs.

FLOYD E. KIDD,
Appellee.

Appeal from the United States District Court for the Eastern District of Tennessee, Northern Division

(Decided April 6, 1957.)

Before McAllister, Miller and Stewart, Circuit Judges.

STEWART, Circuit Judge. This is an appeal from a judgment entered upon a jury verdict for personal in-

juries in a diversity of citizenship case." The underlying facts are no longer in dispute.

The appellee was injured when his leg came in contact with a power saw. His injuries were severe, consisting of a large cut in his right thigh extending down to the bone. He was taken in a state of shock to a hospital in Knoxville, where his wife signed on his behalf a consent to any medical or surgical procedure the surgeon or physician in charge of his case might deem necessary. Because of the appellee's condition the hospital's resident surgeon administered a quantity of blood plasma before performing emergency surgery. The plasma had been manufactured by the appellant.

The appellee made a normal recovery and was discharged from the hospital about a week later. Some two months thereafter, he became afflicted with jaundice, and his condition was diagnosed as probably homologous serum hepatitis. He was confined to a hospital for several days and to his home during a long period of convalescence. The jury determined that this illness had been caused by the blood plasma administered to him upon the occasion of his leg injury, and the appellant does not now dispute that finding.

The plasma in question is a dried powder which by the addition of sterile water is quickly reconstituted into liquid blood plasma which can then be administered as a substitute for whole blood. It has marked advantages over whole blood, particularly for emergency use. Among these advantages are its stability, and the fact that it can be administered safely without first determining the blood type of the recipient.

The manufacture of blood plasma is regulated by the United States Department of Health, Education and Welfare under the Virus, Serum and Toxin Act, 42 U.S.C.A.,

§ 262. The appellant was licensed under that statute to manufacture the plasma in question, and it was manufactured in conformity with the administrative standards promulgated thereunder.

The manufacturing process involves pooling the blood from a substantial number of donors and then processing the pooled blood so as to form the dried plasma. If the blood from a single donor contains the virus of serum hepatitis, there is a risk that a patient to whom the product is later administered may develop the disease. Despite every effort to screen the donors, it is recognized that the possibility that the hepatitis virus may be present in dried plasma cannot be completely obviated. Moreover, if the virus is present, it cannot be discovered by microscopic examination or by any other test known to medical science. It cannot be removed nor destroyed by any known method which does not also destroy the utility of the plasma. As counsel for the appellee concedes, "The only known way to determine whether the virus is present in any given lot of plasma is to give the plasma to a human volunteer and await developments."

Licensed manufacturers of plasma are required by federal authorities to include in the labelling of the product a warning calling the attention of physicians to the possibility that a patient to whom the product is administered will develop serum hepatitis. Such a warning accompanied the package of plasma which was administered to the appellant. The surgeon who administered it stated that he had read that warning or a similar one, and that the possibility of a patient contracting hepatitis or jaundice from blood plasma was well known to him and to the medical profession generally. He referred to it as "a so-called calculated risk."

The appellee's original complaint contained allegations of actual negligence in the manufacture of the plasma and

of breach of implied warranty of merchantable quality and fitness for use. In the amended complaint, however, these claims were abandoned, and the appellee's cause of action was bottomed specifically and exclusively upon the theory that the appellant had violated the Tennessee Food, Drug and Cosmetic Act in selling or delivering an adulterated drug as defined by that statute, and that the violation amounted to negligence *per se*. Tenn. Code Anno., §§ 52-101 through 52-124. This case, therefore, does not involve any question of the appellant's negligence in fact. Cf. *Parker* v. *State*, 112 N. Y. Supp. (2d) 695 (App. Div. 3rd Dept., 1952). Neither does it involve a claimed breach of warranty. Cf. *Perlmutter* v. *Beth David Hospital*, 308 N. Y. 100, 123 N. E. (2d) 792 (1954); *Kenower v. Hotels Statler Co.*, 124 F. (2d) 658 (6 Cir., 1942).

The Tennessee Food, Drug and Cosmetic Act is patterned upon the Federal Food, Drug and Cosmetic Act. It prohibits, among other things, the sale or delivery within that state of any food, drug, device, or cosmetic that is "adulterated." § 52-103 (a), Tenn. Code Anno. The plasma unquestionably was a "drug" as defined by the statute. § 52-102 (d), Tenn. Code Anno. A drug is "adulterated" under the statute "if it consists in whole or in part of any filthy, putrid, or decomposed substance." § 52-115, Tenn. Code Anno.

The appellee's theory was that the plasma in question was adulterated because the virus which it contained was a filthy substance. The district court admitted the testimony of several physicians upon the question of whether the virus was "filthy." The effect of this evidence was inconclusive, except to establish that there is no medical or scientific definition of the term. The court submitted the question to the jury for determination. It is the appellant's claim that this was a question of law to be deter-

mined by the court, and that as a matter of law the hepatitis virus is not a "filthy" substance within the meaning of the statute.

There have been no adjudications by the courts of Tennessee involving the meaning of these provisions of the statute. Both parties to this appeal, however, agree that since the Tennessee law is patterned upon the Federal Act, resort may properly be had to federal court decisions construing the latter statute. The meaning of "filthy" is the subject of a number of decisions by the federal courts in cases involving food, and the courts have apparently been unanimous in holding that the term is not synonymous with "injurious to health" or "unfit for food." *Salamonie Packing Co.* v. *United States*, 165 F. (2d) 205, (8 Cir., 1948), cert. den. 333 U. S. 863; *United States* v. *1851 Cartons, etc.*, 146 F. (2d) 760 (10 Cir., 1945); see *United States* v. *449 Cases, etc.*, 212 F. (2d) 567 (2 Cir., 1954). The fact that hepatitis virus is injurious is thus clearly irrelevant to the question of whether or not it is filthy. Similarly, since filthy is not synonymous with "infected" or "diseased," the trichinosis cases arising under state food and drug laws, relied upon by the appellee, shed no light upon the question in issue. See *Troietto* v. *G. H. Hammond Co.*, 110 F. (2d) 135 (6 Cir., 1940); *Leonardi* v. *Provision Co.*, 143 O. S. 623, 56 N. E. (2d) 232 (1944).

In this connection, the substantial difference between the statutory definition of an adulterated food and that of an adulterated drug is worth pointing out. If the hepatitis virus were present in food, the food would clearly be adulterated under the Tennessee statute. The virus is "a deleterious substance" which may render food "injurious to health." Tenn. Code Anno., § 52-110 (a) (1). The omission of a like provision in the statutory definition of an adulterated drug was obviously not mere inadvertence.

Tenn. Code Anno., § 52.115. The statute tacitly recognizes that many valuable drugs can or may contain substances of potential injury to health. Their use often involves the acceptance of a calculated risk by the physician who prescribes them. The physician in the present case concededly accepted just such a risk.

The federal courts have held that the word "filthy" is intended to be given its ordinary meaning. *United States* v. *Swift & Co.*, 53 F. Supp. 1018, 1020 (MD Ga., 1943); *United States* v. *44 Cases, etc.*, 101 F. Supp. 658, 664 (ED Ill., 1951). The term should not be confined to any supposed scientific or medical definition, and, by the same token, it should not be expanded beyond its accepted connotation in ordinary English speech. The substances under consideration in the cited cases were all filthy within the ordinary meaning of the word: fly eggs, maggots, and rodent hair. The federal statute has been applied to a filthy substance imperceptible to the consumer, when the substance involved was clearly filthy within the ordinary meaning of the word (worm fragments and worm excreta), and where its presence could have been prevented by proper methods of manufacture. *United States* v. *133 Cases of Tomato Paste*, 22 F. Supp. 515 (ED Pa., 1938).

The federal decision which comes closest to supporting the meaning which the appellee would ascribe to the term "filthy" is *United States* v. *Sprague*, 208 Fed. 419 (SD N. Y., 1913). That was a case decided under the Federal Pure Food and Drug Act of 1906. The court held that bacteria, particularly the *Bacillus typhosus*, which had been absorbed by live oysters, during their process of growth, rendered them filthy, "especially since the result of investigation has shown that filth or dirtiness is dangerous through the germs which it contains, and not solely because of offense to the senses." 208 Fed. 421. That decision is differenti-

able for the reason that the bacillus there involved is microscopically detectible, and, as the appellant suggests, perhaps also because the typhoid bacillus was transmitted to the oysters in human sewage and other filth.[1]

Ascribing to words their ordinary meaning, as exemplified by the cases cited, we agree with the appellant that a virus which cannot be seen even with the most powerful microscope, which cannot be described, and the presence of which cannot be known at all except for its ultimate result, is not a filthy substance within the intendment of the statute. For this reason we hold that the district court was in error in failing to direct a verdict for the appellant. This conclusion makes it unnecessary to consider the question of assumption of risk and the effect of the independent intervening act of the physician, as well as other questions raised by the appellant.

The judgment is set aside, and the case is remanded with directions to enter a judgment for the appellant.

McALLISTER, Circuit Judge, dissenting.

I regret that I am unable to concur in Judge Stewart's excellent opinion in this case.

The plasma was a drug. If it contained any filthy substance, it was adulterated, and its sale was prohibited under the Tennessee statute, as is so clearly set forth in the majority opinion. Typhoid bacilli, absorbed by live oysters, render them filthy. *United States* v. *Sprague*, 208 F. 419, cited in the majority opinion. In the similar case of clams, it is impossible to ascertain whether they are infected with typhoid bacilli, unless each clam is subjected to a bacteriological examination by microscope; and it is obviously impossible for producers or vendors to know that they are

[1] Under the present statute the oysters would be adulterated by reason of containing a "deleterious substance" rendering them "injurious to health." 21 U. S. C. A., § 342 (a) (1). See discussion above as to difference in treatment of foods and drugs in this respect.

not infected with typhoid. *Kenower* v. *Hotels Statler Co.*, 124 F. (2d) 658, 660, (C. C. A. 6).

The fact that a substance, contained in a drug, cannot be perceived by a microscope, would seem to have no bearing upon whether it is a filthy substance. Before microscopes, typhoid bacilli, absorbed by oysters, would render them filthy. In the same way, the virus of serum hepatitis contained in plasma renders it filthy, even though it cannot be seen by a microscope; and I would consider this to be the case as a matter of law. Appellee assumed no risk.

In my view, the judgment should be affirmed.